D.P.U. 88-DS-10

Adjudicatory hearing in the matter of a possible violation of General Laws Chapter 82, Section 40, by Fiore & Zenone, Inc.

APPEARANCE: David J. Hopwood, Esq.
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31 Channing Street
Newton, Massachusetts 02158
FOR: FIORE & ZENONE
Respondent

I. INTRODUCTION

On June 29, 1988, the Division of Pipeline Engineering and Safety ("Division") of the Department of Public Utilities ("Department") issued a Notice of Probable Violation ("NOPV") to Fiore & Zenone ("Respondent"). The NOPV stated that the Division had reason to believe that the Respondent performed excavations on Clifton Road, Methuen, in violation of G.L. c. 82, § 40 ("Dig-Safe Law"). The Respondent allegedly failed to exercise reasonable precautions, causing damage to an underground pipe operated by Bay State Gas Company ("Bay State" or "Company").

On August 1, 1988, an informal hearing was held at the Department. In a letter dated August 23, 1988, the Division informed the Respondent of its determination that the Respondent had violated the Dig-Safe Law and informed the Respondent of its right to request an adjudicatory hearing. In that decision, the Division found that the Respondent violated the Dig-Safe Law by using "an excess of explosives ... in the [initial] ignition," and followed that blast with a second blast "which displayed a disregard for public safety."

On October 7, 1988, the Respondent requested an adjudicatory hearing pursuant to 220 C.M.R. § 99.07(3). After due notice, an adjudicatory hearing was held on January 26, 1989 pursuant to the Department's procedures for enforcement under 220 C.M.R. § 99.00 et seq. Robert Smallcomb, a public utilities engineer with the Department, represented the Division. Richard Woodburn, an engineering assistant for Bay State, testified for the Division. Also testifying for the Division were Gary Koslowski, a street foreman for Bay State, and David DiFrancesco, a distribution operator for Bay State. James Zenone, president of Fiore & Zenone,

testified for the Respondent.

II. SUMMARY OF FACTS

A. The Division's Position

At the hearing, Mr. Smallcomb introduced an underground damage report from Bay State (Exh. D-2). In the report, Bay State alleged that the Respondent failed to give an accurate initial or subsequent notification for blasting on Clifton Road in Methuen, Massachusetts (id.). Mr. Smallcomb confirmed that the Respondent had obtained a Dig-Safe number (#88122096), but also stated that the notification made no reference to blasting, and therefore violated the Dig-Safe Law (Tr. at 5, 6). Mr. Smallcomb also stated that the NOPV alleged that the Respondent had failed to exercise reasonable precaution in performing the excavation (id. at 14, 57).

Mr. Koslowski testified that the Respondent blasted in the area of 47 Clifton Road in Methuen on April 4, 1988 (id. at 13). The Respondent blasted three times on April 4, 1988; at 10:15 a.m.; 1:08 p.m.; and 3:45 p.m. (Exh. D-5). The second blast caused the damage (id.). Similar "heavy" charges were used in both the first and second blasts, with a "small" charge used in the third blast after the second blast had damaged the main (id.)

Mr. Koslowski contended that 30 feet of gas line was exposed prior to the blast and that the Respondent must have been aware of the location of the line (id. at 14). Mr. Koslowski admitted that his knowledge of blasting was limited, but contended that pressure caused by the Respondent's blasting had forced the 6-inch main line to buckle upwards and pull out of its 6-inch coupling (id. at 11-14, 23, 26-28, 36). He also testified that after the Respondent blasted, 23 residences lost gas service, but were otherwise unharmed (id. at 13, 34). He asserted that mud

and rock from the excavation had covered any previous markings (id. at 14).

Mr. Koslowski testified that the Company received a call from the Respondent prior to the blasting to obtain a Company representative to "stand by" while the Respondent blasted (id. at 25-26). Mr. Koslowski further testified that Frederick Kennedy, a Bay State employee who is responsible for marking underground facilities, was at the site when he arrived, shortly after the damage had occurred (id. at 35-36, 39).

Mr. Woodburn affirmed that at 9:00 a.m. on April 4, 1988, Bay State was notified by the Respondent over the telephone of blasting in the area [of 47 Clifton Road] due to an unforeseen ledge (id. at 66). Mr. Woodburn testified that the Respondent had called the Company to inform it of the intended blasting (id. at 70-71). Mr. Woodburn also asserted that the Respondent did not contact the Company to request that this main be temporarily moved due to blasting (id. at 71).

Mr. Woodburn testified that the Company would protect its facilities before a blasting by having an individual standing by on the site to take combustible gas indicator readings before and after the blasting to determine whether damage had occurred to Company facilities (id. at 72). He further contended that if a problem due to blasting was imminent, the Company would cooperate "in every way" with the excavator to find a solution to "maintain the safety of the public and integrity of [the company's] facility" (id. at 73).

Mr. Woodburn affirmed that the Company's underground damage report does not state that the main was damaged because of an excessive use of explosives, nor does it mention a second blasting which showed a disregard for public safety (id. at 79-80). He further confirmed that Mr. Kennedy and Mr. Mathews were at the site on April 4, 1988 to respond to a request

made by phone to Bay State earlier that day because the Respondent was planning to do some blasting (id. at 82).

Mr. Smallcomb alleges that the damage to the gas main was caused by overcharging during blasting (id. at 86). Mr. Smallcomb also alleges that the issue of marking is irrelevant due to the fact that the main was exposed (id.). He further contended that because the Respondent had admitted to damaging the main, it was negligent and should be liable for that damage (id. at 86).

B. The Respondent's Position

Mr. Zenone testified that the Respondent was installing a sewer line when it blasted on Clifton Road in Methuen on April 4, 1988 (id. at 47-48, 53). Mr. Zenone acknowledged that the Respondent's blasting broke a main which had been previously exposed (Tr. at 48, 52). He alleged that the main had been poorly connected by its coupling, contributing to the ease with which it was broken by the blast (id. at 48-49).

Mr. Zenone further testified that he was present at the site before, during, and after the blast, although he was not within visual distance of the area in which the damage occurred while the blasting was performed (id. at 49-50). He further stated that he had conferred with the foreman who directly supervised the blasting (id. at 50-51).

Mr. Zenone testified that the Company refused to move the main pipe while the Respondent was blasting (id. at 51). Mr. Zenone also testified that the Company indicated that it couldn't move the main line unless it was broken (id. at 52-53). He further testified that the engineering company of Camp, Dresser & McKee, representing Methuen, also instructed the

Respondent to proceed with the blasting and would not consent to moving the pipe (id. at 62). Mr. Zenone stated that the original markings indicated that the main line was located at the edge of the street, where gas lines are normally located, although it was eventually discovered in the middle of the street, a location traditionally reserved for sewer lines (id. at 52-53).[1]

Mr. Zenone testified that the Respondent had located an unanticipated ledge during its investigation earlier on the morning of April 4, 1988 (id. at 54). He also testified that he was concerned about the danger of blasting near the pipe, and that this concern was the reason he contacted the Company immediately after the Respondent discovered the ledge, prior to any blasting (id. at 55, 61). Mr. Zenone stated that a Company representative was sent to the site prior to the blasting in response to his call (id. at 61).

He stated that the Respondent suspected that the blasting job might cause damage to the main line because the main line was resting on the ledge itself (id. at 61-62). He alleged that the Respondent had proceeded as cautiously as was possible (id. at 53). Mr. Zenone stated that the Respondent had specifically blasted to create a lateral break and avoid damage to the main, but even with that precaution, the pipe was raised enough to damage the main (id. at 56). He also stated that after precautions were taken and the damage had occurred, he realized that the breakage was unavoidable (id.).

Mr. Zenone testified that the foreman who performed the blasting was licensed to blast, and had worked in the construction business for 27 years, the majority of which was spent

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[1] Mr. Zenone alleged that the reason the Company had laid its main in the middle of the road was because of the ledge at the edge of the street where the main would normally be located (Tr. at 55).

blasting (id. at 60). Mr. Zenone further testified that he had been licensed to blast for five years and had worked in the construction business for 20 years (id.).

III. STANDARD OF REVIEW

G.L. c. 82, § 40 states in pertinent part:

> Any such excavation shall be performed in such manner, and such reasonable precautions taken to avoid damage to the pipes, mains, wires or conduits in use under the surface of said public way...including, but not limited to, any substantial weakening or structural or lateral support of such pipe, main, wire, or conduit, penetration or destruction of any pipe, main, wire or the protective coating thereof, or the severance of any pipe, main or conduit.

"Reasonable precautions" is not defined in the statute or the Department's regulations, nor do regulations specify approved conduct. Instead, case precedent has guided the Department in the Dig-Safe area. Several recent cases have established the proposition that using a machine to expose utilities, rather than hand-digging, constitutes a failure to exercise reasonable precautions. See Cairns & Sons, Inc. v. Bay State Gas Co., D.P.U. 89-DS-15 (1990); Petricca Construction Company v. Berkshire Gas Company, D.P.U. 88-DS-31 (1990). John Mahoney Construction Co. v. Boston Gas Company, D.P.U. 88-DS-45 (1990); Northern Foundations, Inc. v. Berkshire Gas Company, D.P.U. 87-DS-54 (1990). However, in Fed. Corp., hand-digging to locate facilities was found to be impossible, and use of a Gradall was found to be reasonable when the Division failed to set forth a reasonable alternative the excavator could have taken to avoid damage. Fed. Corp. V. Commonwealth Gas Company, D.P.U. 91-DS-2 (1992). Further, in situations where markings are clear, it is the excavator's responsibility to be cognizant of the risks in excavating and to adopt an excavating method that is reasonable given the circumstances. Mahoney, supra.

In order for the Department to justly construct a case against an alleged violator of the Dig-Safe Law for a failure to exercise reasonable precaution, adequate support or evidence must accompany that allegation. New England Excavating v. Commonwealth Gas Company, D.P.U. 89-DS-116 at 9 (1993); Fed. Corp. v. Commonwealth Electric Company, D.P.U. 91-DS-2 at 5-6 (1992). In addition, the mere fact that a utility was damaged during an excavation does not by itself constitute a violation of the statute. Yukna v. Boston Gas Company, 1 Mass. App. Ct. 62 (1973). In specific instances where there has been an allegation of failure to exercise reasonable precaution without demonstrating any precautions the excavator could or should have taken, the Department has found that the mere fact of damage will not be sufficient to constitute a violation of the statute. Umbro v. Boston Gas Company, D.P.U. 91-DS-4 (1992); Fed. Corp. v. Commonwealth Electric Company, D.P.U. 91-DS-2 (1992); Albanese Brothers, Inc. v. Colonial Gas Company, D.P.U. 88-DS-7 (1990).

In regard to notices for blasting, G.L. c. 82, § 40 also states in pertinent part:

> initial notice shall indicate whether any such excavation will involve blasting and, if so, the date on which the specific location at which such blasting is to occur; provided, however, that in no event shall any excavation by blasting take place unless written notice thereof, either in the initial notice or a subsequent notice, accurately specifying the date and location of such blasting shall have been given and received at least twenty-four hours in advance, except in the case of an unanticipated obstruction requiring blasting when such notice should not be less than four hours in advance to such ... companies as supply gas, electricity, telephone or cable television services in or to the city or town where such excavation by blasting is to be made.

IV. ANALYSIS AND FINDINGS

The issues to be decided in this case are (1) whether the Respondent gave adequate notice

prior to blasting,[2] and (2) whether the Respondent failed to exercise reasonable precautions to avoid damage to underground facilities.

The Dig-Safe Law states that when blasting is unforeseen, the excavator must contact companies with notification not less than four hours prior to the blasting. Here, the Respondent contacted[3] the Company[4] between 9:00 a.m. and 9:40 a.m. on April 4, 1988, the date of the intended blasting. Three blasts occurred on that date, the first occurring at 10:15 a.m. Before and after each blast, Company representatives were at the site measuring gas levels in the area of the site. The underground facility was completely exposed and required no further marking. Since the Company was the only utility that needed to be notified, and in light of the fact that Company representatives arrived on the site promptly after notification and remained at the site

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[2] In addressing the issue of adequate notice, the Respondent argued that he was not provided with notice of any allegations pertaining to improper Dig-Safe notification (Tr. at 66-67). Because Department adjudicatory hearings are de novo, the Department has wide latitude in framing the issues to be considered in a proceeding. In addition, the issue of improper notice was initially indicated by the Company in its underground damage report. Therefore, the issue of adequate notice will be addressed in the decision.

[3] The Respondent contacted the Company by telephone. In cases of unanticipated obstruction requiring blasting, the Dig-Safe Law does not indicate that notice to utilities must be in writing.

[4] The Dig-Safe Law requires that notice of blasting be provided to companies that supply gas, electricity, telephone, or cable television service in or to the city or town via underground facilities where such excavation by blasting is to be made. Based on the record, it appears that there were no other underground facilities in the area besides that of Bay State. The Department recommends that all excavators call Dig-Safe when making an excavation of any kind. See G.L. 164, c. 76D. Calling Dig-Safe is equivalent to written notification to all companies with underground facilities in the area to be excavated. See G.L. c. 82, § 40 at 69; Heavey Construction and Management Co., D.P.U. 90-DS-3 at 6 (1991); Amendment of Dig-Safe Regulations, D.P.U. 88-40 at 1 (1991).

for all three blasts, the Respondent was not required to wait the entire four hours before each blast. Therefore, the Department finds that the notification for blasting in this case was adequate.

In addressing the issue of whether reasonable precautions were taken to avoid damage to underground facilities, in the past the Department has found that adequate supporting evidence must accompany any allegation that an excavator has failed to take reasonable precautions while excavating, and that damage alone does not indicate a violation of the Dig-Safe Law. Umbro, supra; Fed. Corp., supra; Albanese Brothers, supra; Yukna, supra.

The Division alleged that the Respondent had "overcharged" or used too much explosive when it blasted, and therefore the Respondent violated the Dig-Safe Law by failing to take reasonable precautions to protect underground facilities. However, the Division did not indicate specific reasonable precautions the Respondent could have taken to prevent damage. Evidence presented in this case is in conflict as to whether the Respondent requested that the gas main be moved before blasting. In addition, the Division did not demonstrate that the amount of explosives used by the Respondent was unreasonable, nor did it provide evidence of an amount of explosives that would have been reasonable. In fact, the Division's own evidence shows that charges used in the first and second blasts were similar, yet damage only occurred in the second blast. No evidence was presented demonstrating that the first blast contributed to the damage caused by the second blast. Finally, none of the Division's witnesses purported to be experts in blasting techniques, or even testified that they were licensed to blast in Massachusetts.

Although the Division contended that reasonable precautions were not taken by the Respondent while blasting, adequate support or evidence must accompany any allegation that an

excavator failed to exercise reasonable precautions in order for the Department to justly construct a case against the alleged violator. See New England Excavating, supra; Umbro, supra, at 8. Here the Division has not presented such adequate support or evidence.[5] The Division also contended that the mere fact that damage was caused by the Respondent was a reason to find that the Respondent had violated the Dig-Safe Law, but this contention is in direct conflict with case precedent. See Fed. Corp., supra; Albanese Brothers, supra; Yukna, supra.

Therefore, the Division did not adequately demonstrate that the Respondent failed to exercise reasonable precautions when blasting at the locus. Accordingly, the Department finds that the Respondent did not fail to exercise reasonable precautions in blasting during excavation on Clifton Road in Methuen, Massachusetts on April 4, 1988, in conformance with the requirements of the Dig-Safe.[6]

IV. ORDER

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[5] The Supreme Judicial Court may set aside a decision as prejudiced for further action when that decision is "(e) Unsupported by substantial evidence." G.L. c. 30A §§ 14(7). Substantial evidence is defined as "such evidence as a reasonable mind might accept as adequate to support a conclusion. G.L. c. 30A, §§ 1(6); New England Excavating v. Commonwealth Gas Company, supra.

[6] We caution that this finding should not be construed as approval of the Respondent's excavating methods nor as a pronouncement of a new standard for excavators to follow. Common sense would tell us that the use of blasting directly under an exposed gas main may not be appropriate. Where there is material evidence to support an inference of a lack of reasonable care, failure on the part of the excavator to provide evidence to negate the allegation will lead to a finding that the excavator has violated the Dig-Safe Law. New England Excavating, supra; Northern Foundations, Inc. v. Berkshire Gas Company, D.P.U. 87-DS-54 (1990). Here, material evidence to support this inference was not presented. We will continue to evaluate whether the precautions taken by excavators blasting near underground utilities was reasonable given the facts of each case.

Accordingly, after due notice, hearing, and consideration, the Department

FINDS: That Fiore and Zenone, Inc. did not fail to use reasonable precautions while blasting on Clifton Road in Methuen, on April 4, 1988; and

FURTHER FINDS: That Fiore and Zenone, Inc. did not fail to provide proper notification to utilities for blasting on Clifton Road in Methuen, on April 4, 1988, and thus was in conformance with the requirements of the Dig-Safe Law. Therefore, it is

ORDERED: That the NOPV issued against the Respondent is hereby Dismissed.

By Order of the Department,